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# Keeping Cross-Examination Under Control

J. Alexander Tanford

*Indiana University Maurer School of Law*, [tanford@indiana.edu](mailto:tanford@indiana.edu)

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# Keeping Cross-Examination Under Control

*J. Alexander Tanford*<sup>†</sup>

## I. Introduction

Television dramas portray cross-examinations as exercises in pyrotechnics: The lawyer asks hostile and sarcastic questions mixed with clever asides to the jury, and the witness gives evasive answers. Cross-examination causes Captain Queeg to reveal his mental instability in *The Caine Mutiny*;<sup>1</sup> cross-examination wrings a confession from the defendant's wife that she has been lying to frame her husband in *Witness for the Prosecution*.<sup>2</sup> Perry Mason used cross-examination as an investigative tool to search for the real murderer. This may make good theater—portraying the struggle between good and evil—but it hardly paints an accurate portrait of cross-examination. Rarely in a lawyer's career will she ever have to battle a scheming, dishonest witness, knowing that the witness's testimony must be broken in order to save an innocent client.

If cross-examination is not usually a battle of wits between a scheming witness and a clever attorney, then how should cross-examination be understood? Like direct examination, cross-examination is primarily a method of proving your case by eliciting testimony from a witness, *when you have reason to believe the witness will be able to provide that testimony*. Cross-examination's success depends not on your ability to ask clever questions, but on your ability to control the flow of information. The witnesses you cross-examine possess information

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<sup>†</sup> A.B. (1972), Princeton University; J.D. (1976), L.L.M. (1979), Duke University. Professor Tanford is a Professor of Law and Hastings Faculty Fellow at Indiana University—Bloomington Law School. This Article is adapted from *THE TRIAL PROCESS: LAW, TACTICS AND ETHICS* (2d ed. 1993), written by Professor Tanford and published by the Michie Company, Charlottesville, Virginia.

1. HERMAN WOUK, *THE CAINE MUTINY: A NOVEL OF WORLD WAR II* 426-39 (1951).
2. AGATHA CHRISTIE, *WITNESS FOR THE PROSECUTION: A PLAY IN THREE ACTS* (1954).

favorable to your opponent and harmful to you. Some witnesses will be hostile, some suspicious, and some defensive. None of them will react with gratitude when you attack their credibility. If you fail to control the cross-examination, you invite disaster. If you allow a witness to choose the subject matter of the testimony, the witness may end up repeating the direct examination, explaining away the weaknesses in her testimony, or avoiding the impeachment of her testimony.

On direct examination, witnesses are controlled through preparation and rehearsal. On cross-examination, however, rehearsal is usually difficult or impossible. You will have to find other sources for determining what the potential witness is likely to say on the stand—usually depositions, written statements, or interviews. Also, if you lack the opportunity to “woodshed” a witness in order to work on the way she phrases her answers, you will have to build suggestions carefully into your questions. Thus, your cross-examination must be more meticulously planned and cautiously executed than other phases of the trial.

The approach to cross-examination described in this Article begins from this premise. This Article considers cross-examination a dangerous foray behind enemy lines. The only way such incursions can be successful is if they are carefully planned, tightly controlled, and thoroughly disciplined.

## II. Legal Framework

All litigants have the right to cross-examine witnesses who give adverse testimony. For defendants facing criminal charges, this right is found in the Sixth Amendment’s guarantee that the accused has the right to “be confronted with the witnesses against him.”<sup>3</sup> The Supreme Court held that under no circumstances shall a court deprive the accused of the right to subject prosecution witnesses to the ordeal of a cross-examination.<sup>4</sup> In *Pointer v. Texas*,<sup>5</sup> the Court stated: “It cannot seriously be doubted at this late date that the right of cross-examination is

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3. *Mattox v. United States*, 156 U.S. 237, 240, 15 S. Ct. 337, 338, 39 L. Ed. 409, 410 (1895).

4. *Mattox*, 156 U.S. at 244.

5. 380 U.S. 400, 85 S. Ct. 1065, 13 L. Ed. 2d 923 (1965).

included in the right of an accused in a criminal case to confront the witnesses against him.’<sup>6</sup> This right includes the opportunity to test the recollection and sift the conscience of the witness and to give the jury the chance to view the witness’s demeanor.<sup>7</sup>

Other parties also have the fundamental right to cross-examine witnesses called by their opponents.<sup>8</sup> In criminal cases, the prosecutor is entitled to cross-examine defense witnesses, including the accused.<sup>9</sup> In civil cases, the right to cross-examine is part of the fundamental due process to which all parties are entitled.<sup>10</sup> However, this does not mean that cross-examination is completely unbridled in scope and duration. A party is entitled to a full and fair opportunity to cross-examine, but a party is not entitled to raise irrelevant issues or to mislead the jury.<sup>11</sup> Although a judge has more discretion to limit cross-examination in civil cases, she may do so only after a party has had a fair and substantial opportunity to exercise the right.<sup>12</sup>

The right of cross-examination encompasses not merely the right to ask questions,<sup>13</sup> but also the right to elicit testimony.<sup>14</sup> The judge can and should compel a witness to answer proper questions.<sup>15</sup> A witness’s continued refusal to answer questions may subject the witness

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6. *Pointer*, 380 U.S. at 404.

7. *Mattox*, 156 U.S. at 242.

8. See, e.g., *Corrosion Proof Fittings v. Environmental Protection Agency*, 947 F.2d 1201 (5th Cir. 1991) (recognizing general rights of contestants in administrative hearings to cross-examine). But see *Wolff v. McDonnell*, 418 U.S. 539, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974) (stating cross-examination is not a right “universally applicable to all hearings”).

9. See *Trawick v. State*, 431 So. 2d 574, 576 (Ala. Crim. App. 1983); *Viener v. State*, 150 Ga. App. 175, 257 S.E.2d 22 (Ct. App. 1979).

10. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 176, 90 S. Ct. 1598, 1618, 26 L. Ed. 2d 142, 164 (1970) (Black, J., concurring).

11. See *United States v. Williams*, 504 U.S. \_\_\_, \_\_\_, 112 S. Ct. 1735, 1749, 118 L. Ed. 2d 352, 373-74 (1992) (Stevens, J., dissenting) (quoting *Berger v. United States*, 295 U.S. 78, 84-85, 55 S. Ct. 629, 631-32, 79 L. Ed. 2d 1314, \_\_\_ (1935)).

12. See, e.g., *Kekua v. Kaiser Hosp.*, 61 Haw. 208, 601 P.2d 364 (1979); *Hunt v. Regents of the Univ. of Minnesota*, 460 N.W.2d 28 (Minn. 1990).

13. See JOHN W. STRONG ET AL., *MCCORMICK ON EVIDENCE* § 19 (4th ed. 1992).

14. See THOMAS A. MAUET, *FUNDAMENTALS OF TRIAL TECHNIQUES* § 6.5 (3d ed. 1992).

15. See *Hoffman v. United States*, 341 U.S. 479, 486, 71 S. Ct. 814, 818, 95 L. Ed. 1118, 1124 (1951) (stating that a witness is not exonerated from answering merely by declaring that doing so, he would incriminate himself).

to punishment for contempt.<sup>16</sup> In cases where cross-examination is effectively denied, the court may strike all or part of the direct examination<sup>17</sup> or, as an extreme remedy, grant a mistrial—even if the denial of an opportunity for full cross-examination is no one's fault.<sup>18</sup> Whether the direct examination must be stricken because of the witness's failure to submit to cross-examination is largely a discretionary decision for the trial judge.<sup>19</sup> Striking part or all of the direct examination depends not on whether the witness had a justification for not answering, but on whether permitting the direct examination to stand unchallenged would be fair.<sup>20</sup>

Because the witness may be hostile and uncooperative, courts generally permit leading questions throughout cross-examination;<sup>21</sup> however, the trial judge has discretion to stop an interrogation that appears to be eliciting unreliable or distorted evidence.<sup>22</sup> Contrary to what we see on television, however, an attorney may not ask misleading or trick questions, nor frame questions in such a way as to elicit half-truths and

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16. See *Yates v. United States*, 355 U.S. 66, 78 S. Ct. 128, 2 L. Ed. 2d 95 (1957).

17. See, e.g., *Lawson v. Murray*, 837 F.2d 653 (4th Cir.) (stating that striking all of a witness's testimony may be the only appropriate remedy when refusal to answer the questions of the cross-examiner frustrates the purpose of the process), *cert. denied*, 488 U.S. 831 (1988); *United States v. Lord*, 711 F.2d 887 (9th Cir. 1983) (stating that striking a witness's testimony is appropriate when the question asked pertains to matters directly affecting witness's testimony, but the court may not strike the testimony when the answer pertains to a collateral matter).

18. See, e.g., *Henderson v. Twin Falls Co.*, 59 Idaho 97, 80 P.2d 801 (1938) (stating it was not error to strike the testimony of a witness who died before cross-examination could be completed). Cf. *United States v. Siefert*, 648 F.2d 557 (9th Cir. 1980) (stating that the trial court did not commit error by denying defendant's motion to strike all of a witness's testimony following the witness's invocation of his Fifth Amendment privilege).

19. See STRONG ET AL., *supra* note 13, § 19.

20. Compare *Montgomery v. United States*, 203 F.2d 887 (5th Cir. 1953) (stating that defendant's Fifth Amendment privilege should have been denied in toto rather than upholding the privilege in part) with *United States v. Toner*, 173 F.2d 140 (3d Cir. 1949) (stating that a Fifth Amendment claim does not require striking of direct examination where questions on cross-examination had no relevance to the matter testified to by witness on direct examination). Compare *Stephan v. United States*, 133 F.2d 87 (6th Cir.) (stating that it is in the trial court's discretion to strike the direct examination of a witness upon their refusal to answer one or more questions for no reason), *cert. denied*, 318 U.S. 781 (1943) with *United States v. Keown*, 19 F. Supp. 639 (W.D. Ky. 1937) (stating that unjustified refusal to answer questions required direct examination to be stricken).

21. See FED. R. EVID. 611(c); STRONG ET AL., *supra* note 13, § 20.

22. See STRONG ET AL., *supra* note 13, §§ 20-21.

distortions.<sup>23</sup> Questions that are compound, argumentative, that misquote a witness, or assume facts not in evidence are impermissible.<sup>24</sup>

The right to ask leading questions carries with it the right to insist that the witness give direct, responsive, and limited answers. If a question was fair and simple, the judge, on request, may strike all unresponsive and evasive portions of an answer from the record.<sup>25</sup> However, courts generally allow the witness to give a relevant explanation if neither a "yes" nor a "no" would be accurate.

### III. Planning Cross-Examination

Effective planning is the first step to controlling cross-examination. Despite the apparent spontaneity, the best cross-examinations are as meticulously planned as any other aspect of the trial. Effective cross-examination is the result of thorough investigation, research, and preparation done well in advance, not of some sixth sense for detecting human weaknesses.

#### A. Should You Cross-Examine?

Too many lawyers automatically cross-examine every witness called by their opponent. No rule of trial practice requires this. If you have nothing specific you want to accomplish, cross-examination is likely to be an unfocussed rehash of the direct examination, or a poorly planned attack on the witness's character. Good tacticians pick their battles carefully.

There are a number of reasons to forgo cross-examination: (1) the witness has no helpful or corroborating testimony to offer; (2) the witness has testified on an uncontested issue or has not otherwise hurt your theory of the case; or (3) even if the witness has hurt your case, you have no ammunition for an attack. However, if the witness has helpful information, can corroborate your own key witnesses, or the witness's damaging

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23. See *id.* § 7; Mark P. Denbeaux & D. Michael Risinger, *Questioning Questions: Objections to Form in the Interrogation of Witnesses*, 33 ARK. L. REV. 439, 478-81 (1980).

24. See Denbeaux & Risinger, *supra* note 23, at 478-81; J. ALEXANDER TANFORD, *THE TRIAL PROCESS: LAW, TACTICS AND ETHICS* 183-86 (2d ed. 1993).

25. See *Webster v. State*, 206 Ind. 431, 190 N.E. 52 (1934) (characterizing witness's answers as unresponsive).

testimony can be impeached, then cross-examination is strongly recommended.

## **B. What Topics to Include**

At the early stages of preparation, you must distinguish between “topics” and “questions.” A topic is a discrete issue you want to raise on cross-examination because you expect to be able to establish something helpful to your theory of the case. A question serves as a means of trying to achieve that end. Maintaining control of a witness usually requires many specific questions to pursue a single topic.

For example, in order to show bias against the defendant, you may want to prove that the witness and the defendant got into a fight last year. That presents a *topic* you will pursue on cross-examination. However, you immediately lose control of the witness if you just ask:

Q: Aren't you biased against Conrad Stevens because of a fight you had?

Such a broad question calls for a broad, explanatory response—just what you do not want. Developing this topic through several specific questions is better.

Q: Directing your attention to August 14, 1990, you attended a party at Mary Royce's house, correct?

Q: You saw Conrad Stevens at that party, didn't you?

Q: About 10:00 pm, you and Mr. Stevens began arguing, didn't you?

Q: Isn't it true you punched Mr. Stevens?

Q: And then you told him you hated him, correct?

Deciding which topics to cover on cross-examination is a two-step process: generating a list of potential topics and winnowing it down to the more important ones. Generating a list of potential topics is the easy part; winnowing is more difficult. Lawyers are often reluctant to abandon any potentially productive line of inquiry, however unlikely the success. The following suggestions might help.

### **1. Does a Topic Advance Your Theory of the Case?**

You should not pursue a topic on cross-examination just because it is available. You may possess a certified copy of a witness's prior

conviction for perjury, but unless your theory calls for a personal attack on the witness, there is no reason to bring it up.

## **2. How Important is a Topic in Relation to Others?**

In some cases, only one or two potentially productive topics may advance your theory, so you can pursue them all. However, if you have a large number of potentially productive topics that you could raise, you will have to choose which ones to include in your cross-examination. The general advice of experienced advocates is that you should limit cross-examination to a few important issues rather than take the “shotgun” approach. After all, jurors have finite capacities to retain information, so they may forget your main points if you bury them among less significant issues.

## **3. Is a Topic Consistent with Others You Want to Raise?**

In general, you can categorize witnesses as reliable, unreliable, or evil. Rarely can you make a convincing case that a witness falls into more than one of these categories. If your theory of the case relies on the testimony of a witness, there is little point in impeaching. If the witness is a nice older lady with bad hearing and vision, there is no point bringing up evidence of her bad character.

This issue commonly arises when you need to elicit helpful testimony from a witness who also helped your opponent. If you impeach that witness, you weaken the effect of the favorable testimony. If you choose not to impeach, then the adverse testimony goes unchallenged. If you leave out the helpful testimony, you might not have enough evidence to prove your case. The best approach often will be to do both, but to develop the affirmative evidence first. There are two reasons for this approach: (1) the witness undoubtedly will become less cooperative once the witness realizes she is under attack, and (2) experiments have shown that jurors pay less attention to testimony after the source of it has been shown to be unreliable.<sup>26</sup> If the favorable testimony elicited

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26. See Brian Sternthal et al., *The Persuasive Effect of Source Credibility*, 42 PUB. OPINION Q. 285, 289 (1978).



is particularly important, then some consideration should be given to forgoing impeachment.

A similar dilemma arises when your only real goal on cross-examination is impeachment. You need to decide why the jury is supposed to discount the witness's testimony. Is she unreliable because of a faulty memory, poor eyesight, or because she viewed the events from an obstructed vantage point? Is she a cold-blooded liar with a motive to harm your client? You should choose one theory on which to impeach the witness. Mixing two theories can be confusing to the jury and if you concentrate on presenting both theories you may neglect to fully develop either one.

#### 4. How "Safe" is the Topic?

Safety is the central issue in maintaining control during a cross-examination. Adverse witnesses possess information favorable to your opponent, and they may be hostile and may react defensively to any attempts of impeachment. If you fail to control the topics raised on cross-examination, the witness will likely end up repeating the direct examination, explaining away the weaknesses, or avoiding the impeachment of her testimony.

In order to accomplish this elusive goal of control, trial lawyer folklore teaches that you should never ask a question to which you do not already know the answer.<sup>27</sup> However, you should not take this advice too literally. You never will know with absolute certainty what answer a witness will give. No matter how many times the witness has said something before trial or how many sworn statements the witness has made, she still may say something completely unexpected when questioned at trial.

What this aphorism means, therefore, is something slightly different: *You have the greatest control over a witness when you are asking for evidence that the witness has previously given in an interview, statement, deposition, or prior trial.* If a witness testified once, the witness is likely (though not certain) to testify the same way again, and you have the

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27. The advice is most often attributed to Irving Younger. See IRVING YOUNGER, *THE ART OF CROSS-EXAMINATION* 23 (1976).

ability to impeach or refute testimony if the testimony is unexpectedly different. If a witness made a prior statement that the traffic light was green, she cannot now say that the traffic light was red or that she did not see the traffic light or that she cannot remember, without being impeached. Therefore, an attempt to elicit from the witness that the light was green is *relatively*, but not completely, safe.<sup>28</sup>

High safety topics are those where you have a reason to believe that the witness will give certain testimony, and where you have the ability to refute contrary answers. A topic is of high safety if: (1) the witness has previously provided the information in a statement or deposition; (2) the information can be found in admissible exhibits, such as photographs or records of criminal convictions, and the witness logically should know about the matter; or (3) you are asking about information the witness should know that other more credible witnesses will include in their testimony.

Medium safety topics are those where the nature of the case raises a likelihood that the witness will testify a certain way but where you have no direct way to refute contrary testimony. The following are medium safety topics:

- Asking about facts consistent with human experience where unfavorable testimony would contradict common sense.
- Questioning a witness about an issue on which the witness assumes that an independent refutation witness is available.
- Asking the witness to confirm something implied in or inferable from a witness's prior statement, but that no one has previously asked the witness to confirm or deny.
- Hoping the witness will testify that something did *not* happen because the witness says nothing about it in an otherwise detailed prior statement. For example, if a police officer's accident investigation report is silent on whether your client had been drinking, there is a likelihood that the officer will admit that there was no evidence of intoxication. Common sense tells us that a police officer would have reported intoxication.

Low safety topics are those where you engage in wishful thinking, hoping that a witness will give favorable testimony, but having no way to be sure. Circumstances may suggest that a witness might know

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28. The notion of safety was first articulated by Paul B. Bergman, *A Practical Approach to Cross-Examination: Safety First*, 25 UCLA L. REV. 547, 555-76 (1978). Bergman referred to the safety of "questions," rather than topics, and did not distinguish between the two.

something relevant, but the witness has never said anything one way or the other. Thus, you have no reasonable basis to believe the witness's testimony will actually help you, but the witness also has never explicitly said anything to the contrary, so (you think) *maybe* the witness will unexpectedly provide favorable evidence. These are the kinds of topics lawyers caution against pursuing when they warn you not to ask questions if you do not know the answer. The risk is especially high under the following circumstances:

- The witness acted inconsistently with the fact sought. For example, you may be trying to corroborate your client's testimony that the victim pulled a knife on him. A written statement by the victim's roommate indicates that he was "eating pizza and watching TV" just before the shooting. Asking the roommate whether he saw the victim pull a knife is a low safety topic. To suggest that the roommate would have continued calmly eating pizza while others were waving knives about is unlikely.
- The weight of the testimony of other witnesses is to the contrary. For example, if four witnesses claim the victim had no knife, then asking the fifth witness if she saw a knife is risky, even if her statement is silent on the point.
- The evidence would contradict common sense. For example, if you are cross-examining an eyewitness to a crime that occurred at night but in a well lighted parking lot, then asking whether the area was too dark to see clearly would be risky.

Completely unsafe topics are those where you ask a witness to change her testimony. You want the witness to agree to elements of your version of the story, despite the fact that the witness has given prior statements or testimony to the contrary. Pursuing such a topic without being argumentative is almost impossible and trying it is extremely unwise. Bergman writes:

The "your story" mode of cross-examination is often used in dramatic works [and] . . . would result in asking these kinds of questions of the defendant [claiming self-defense]:

"Mr. Jones, you actually struck the first blow, didn't you?"  
"And then you picked up a stick?"  
"And you chased Mr. Smith with this stick?"

In drama, the witness breaks down and admits that the cross-examiner is correct. In actual trials, however, the witness usually just keeps saying

"No." After all, the implicit question, "Aren't you an abject liar?" is rarely answered in the affirmative.<sup>29</sup>

The safety approach to topic selection has the added benefit of keeping you out of ethical trouble. The ABA Model Code of Professional Conduct requires a good faith basis for any question asked on cross-examination.<sup>30</sup> Rule 3.4 (e) provides: "A lawyer shall not in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence. . . ." <sup>31</sup> Rule 3.3(a) states that "[a] lawyer shall not knowingly . . . make a false statement of material fact" <sup>32</sup> nor "offer evidence that the lawyer knows to be false." <sup>33</sup>

The good-faith-basis test requires that you have a *factual* basis for the cross-examination.<sup>34</sup> You must be in possession of reliable information that the underlying fact is true. Even an innocuous question such as: "Have you ever been convicted of a crime?" ethically may not be asked unless you have some indication that the witness has in fact been convicted.<sup>35</sup> The very act of asking such a question may cause jurors to assume there is some truth to it. If the witness denies it, the potential danger is compounded. The jurors may think that the witness not only committed a crime, but also lied by denying it. Thus, asking about low safety topics is also usually unethical.<sup>36</sup>

Opinions differ on what constitutes a sufficient factual basis for asking a question.<sup>37</sup> For example, in *State v. Williams*,<sup>38</sup> the Minnesota Supreme Court stated that an FBI "rap sheet" indicating that a witness

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29. *Id.* at 572-73.

30. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.4 (1994).

31. *Id.* Rule 3.4(e).

32. *Id.* Rule 3.3(a)(1).

33. *Id.* Rule 3.3(a)(4).

34. *Id.* Rule 3.4(e).

35. See MODEL RULES OF PROFESSIONAL CONDUCT 3.4 (1994); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-106 (1983).

36. See MODEL RULES OF PROFESSIONAL CONDUCT 3.4 (1994); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-106 (1983).

37. See *State v. Williams*, 297 Minn. 76, 210 N.W.2d 21 (1973). Cf. *Hazel v. United States*, 319 A.2d 136 (D.C. 1974).

38. 297 Minn. 76, 210 N.W.2d 21 (1973).

had been convicted was *not* a sufficient factual basis for asking the witness about those convictions.<sup>39</sup> The questions would be acceptable only if the lawyer had a record from the court in which the conviction occurred.<sup>40</sup> The District of Columbia Court of Appeals took the opposite view in *Hazel v. United States*,<sup>41</sup> requiring only that a question not be totally groundless.<sup>42</sup> Under this more lenient view, you may cross-examine as long as you can point to any source that is not inherently incredible.<sup>43</sup> This latter view is probably the more common interpretation.

A more difficult question arises if the cross-examiner asks a question out of ignorance. Advocates of the "fishing expedition" type of cross-examination say that sometimes you may have to probe, searching for a ground to impeach the witness.<sup>44</sup> Can you ask the witness, for instance, whether she has biases against your client if you are sincerely searching for relevant information? If your question is neutral ("How do you feel about my client?"), it probably is ethical because you are not suggesting the existence of specific facts. However, if your question suggests an answer ("You hate my client, don't you?"), you must have a good-faith basis for it. If you have no idea what the witness's answer will be, that basis is absent.

### C. Order of Cross-Examination Topics

How you begin your cross-examination may either facilitate or inhibit your quest for control. If you are going to attack the witness aggressively, "[e]xperienced advocates stress the importance of commencing a cross-examination with a sharply-worded, surprise question, calculated to embarrass the witness and throw him off balance; the idea being that he may not only be immediately disconcerted but may lose his assurance

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39. *Williams*, 210 N.W.2d at 25-26.

40. *Id.* at 26.

41. 319 A.2d 136 (D.C. 1974).

42. *Hazel*, 319 A.2d at 140.

43. *See id.*

44. ARNOLD J. WOLF, CROSS-EXAMINATION ON TRIAL 38 (1988).

and fumble his subsequent answers.”<sup>45</sup> If you plan to be courteous, however, “it is frequently advisable to ask as one’s first question something competent and admissible but entirely foreign or apart from the controversial elements of the case . . . and from thence gradually and easily gain [the witness’s] confidence.”<sup>46</sup>

You generally should not begin cross-examination on the topic on which the direct ended, especially if you are attacking. Witnesses do not readily admit to errors in their testimony. If you start in on a subject still fresh in the witness’s mind, the witness will be likely to figure out where it leads, anticipate your ultimate point, and begin qualifying and evading your questions.<sup>47</sup>

Similarly, you generally should not follow the chronological order of direct examination, particularly if you intend to impeach the witness. The witness, through pretrial preparation, is likely to have learned this sequence well and will be ready with damaging testimony before you have even asked your questions. Each question you ask may trigger a prepared paragraph of testimony rather than the one-word answer you hope to receive. If you change the order of examination so that it moves non-chronologically, then the witness will not have time to anticipate the direction of the examination. This approach does present risk, however. Judge Robert Keeton criticizes the “hop, skip, and jump” organization as having the same effect on the jurors as it does on the witness: they will have so much difficulty following the sequence that they will not think about the answers.<sup>48</sup>

Judge Keeton’s criticism assumes that the jury will have difficulty following a non-chronological cross-examination because it will be in no particular order. This need not be the case. You can deviate from chronological order and yet still allow the jury to follow the cross-examination. Most cross-examinations will contain only a few topics,

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45. 3 FRANCIS X. BUSCH, *LAW AND TACTICS IN JURY TRIALS* § 412 (1960).

46. ASHER L. CORNELIUS, *THE CROSS-EXAMINATION OF WITNESSES* 261-62 (1929).

47. *But see* PAUL BERGMAN, *TRIAL ADVOCACY IN A NUTSHELL* 164 (2d ed. 1989). Here, Bergman suggests that, if you have the ammunition to refute the last point made in the direct examination, you might want to “[b]egin cross on whatever point direct finishes. Like the bull who makes a dramatic entrance by charging directly at the matador, you leap into the fray by taking up right where the direct left off.” *Id.* ¶ C.

48. ROBERT E. KEETON, *TRIAL TACTICS AND METHODS* § 3.20 (2d ed. 1973).

which you can easily arrange according to the purpose for which you are offering them. You might consider the following order:

- (1) high safety favorable evidence on contested issues;
- (2) high safety evidence that corroborates your main witnesses;
- (3) medium safety favorable evidence;
- (4) medium safety impeachment evidence;
- (5) high safety impeachment attacking the witness's testimony; and
- (6) high safety impeachment attacking the witness personally.

This organization helps minimize damage caused by losing control of a cross-examination. You are more likely to lose control of medium safety topics than high safety ones, so you put the riskier topics in the middle. This takes maximum advantage of the psychological principles of "primacy" and "recency." Primacy refers to the tendency of jurors to remember what they hear first and for that memory to more heavily influence them.<sup>49</sup> Psychologists have confirmed what our mothers always told us: first impressions are important.<sup>50</sup> Recency refers to the tendency of jurors to remember what they hear last in a sequence.<sup>51</sup> These principles suggest that losing control of cross-examination at the very beginning or the very end is particularly damaging.

Some lawyers recommend that the cross-examination end with one or more summary, or wrap-up questions. They argue that the jury needs to hear, in conclusory form, the point of your cross-examination.<sup>52</sup> The better wisdom is to save your summaries for closing argument.<sup>53</sup> If you summarize in question form, you give the witness a wide-open opportunity to debate the proper conclusions to be drawn from the facts. Opposing counsel may also object to summary questions as argumentative.

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49. See, e.g., Norman Miller & Donald Campbell, *Recency and Primacy in Persuasion as a Function of the Timing of Speeches and Measurements*, 59 J. ABNORMAL & SOCIAL PSYCH. 1 (1959).

50. See SAUL M. KASSIN & LAWRENCE S. WRIGHTSMAN, *THE AMERICAN JURY ON TRIAL: PSYCHOLOGICAL PERSPECTIVES* 132-37 (1988).

51. See, e.g. Miller & Campbell, *supra* note 49.

52. See F. LEE BAILEY & HENRY ROTHBLATT, *SUCCESSFUL TECHNIQUES FOR CRIMINAL TRIALS* § 11:32 (2d ed. 1985); KEETON, *supra* note 48, at 141.

53. See KEETON, *supra* note 48, at 141. "[I]t is a crude way of doing what generally can be done more effectively through other means. Long before cross-examination you have ample opportunity to present your theory of the case . . . when you are examining the jury panel, reading your pleadings, or making an opening statement." *Id.*

In either situation, you have lost control of the crucial final moments of your examination.

### **D. Should You Ever Go Fishing?**

Maintaining control of cross-examination is the most difficult (perhaps even impossible) when you pursue low safety topics. For that reason, most effective trial lawyers do not use cross-examination as a fishing expedition. If you did not pursue the issue in discovery, and have no idea what the witness will say, you probably should not pursue it on cross-examination.

However, William Gallagher suggests that on certain occasions one should plan a "fishing trip," or exploratory cross-examination.<sup>54</sup> One of those times consists of having the witness repeat the direct testimony, as damaging as it may be, probing for a weak spot. Gallagher suggests using this as a last resort for a witness who tips the scales in favor of the opponent.<sup>55</sup> Before attempting this path, you should ask yourself what your chances are of discovering anything new that did not appear during pretrial investigation, interviews, and depositions of the witness.

Where the witness has left no loophole in his direct examination, and you know of no weak points that could profitably be exploited on cross-examination, do not attempt to cross-examine. Dismiss the witness with a curt gesture that says: "too unimportant to bother about." [Do not] trust to providence that your interrogation will develop one or more weak points. [Unfavorable testimony] carries more weight than it would have had it been elicited on direct examination.<sup>56</sup>

If you absolutely must pursue a low-safety topic, where should you put it? If your curiosity overwhelms your prudence, and you decide to raise the topic despite being warned against it, you must do it at some point. The logical location would seem to be in the middle, where weaknesses are traditionally placed. Since you should cover helpful testimony first and impeachment last, beginning and ending with strong

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54. Harry S. Bodin, et al., *CIVIL LITIGATION AND TRIAL TECHNIQUES* 552, 552 (Harry S. Bodin ed. 1976).

55. *Id.* at 552.

56. 1 SYDNEY C. SCHWEITZER, *CYCLOPEDIA OF TRIAL PRACTICE* § 235, at 614 (2d ed. 1970).



points, the only place left is somewhere in the middle. Then, if the warnings prove justified, you can still finish with safe topics.

### **E. Should You Ever Try to Convince a Witness to Change Testimony?**

If you find yourself arguing with a witness, you have lost control. Nevertheless, some lawyers suggest that compelling an adverse witness to change her testimony may be possible by using the inexorable logic of facts from which she cannot escape.<sup>57</sup> They recommend laying out the facts before such a witness, and demanding that she confirm the attorney's conclusion about those facts.<sup>58</sup> Is this a realistic possibility? Is it not far more likely that the witness will simply argue with your conclusions, dig in, and become more stubbornly committed to her original testimony?

It is absurd to suppose that any witness who has sworn positively to a certain set of facts, even if he has inadvertently stretched the truth, is going to be readily induced by a lawyer to alter them and acknowledge his mistake. People as a rule do not reflect upon their meager opportunities for observing facts, and rarely suspect the frailty of their own powers of observation. They come to court, when summoned as witnesses, prepared to tell what they think they know; and . . . they resent an attack upon their story as they would one upon their integrity.<sup>59</sup>

### **F. Should You Ever Try to Introduce Exhibits?**

On appropriate occasions, you may want to use diagrams or other exhibits during cross-examination—assuming the rules of evidence in your jurisdiction permit it.<sup>60</sup> You should employ this tactic cautiously. Obviously, you can go over exhibits introduced or referred to by your adversary since they are part of the direct examination.<sup>61</sup> However,

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57. HARRY S. BODIN ET AL., CIVIL LITIGATION AND TRIAL TECHNIQUES 444 (Harry S. Bodin ed. 1976).

58. *See id.* at 444-50.

59. FRANCIS L. WELLMAN, THE ART OF CROSS-EXAMINATION 30 (4th ed. 1962).

60. *See* KEETON, *supra* note 48, at 132.

61. *See id.* at 131-33.

remember that before introducing a new exhibit, you must lay a foundation, and the witness may not be cooperative. The witness may find fault with the exhibit by claiming that it contains inaccuracies or selective distortion.<sup>62</sup> Not only would failure to establish a foundation prohibit use of the exhibit, the failure would also taint future use by your own witnesses.<sup>63</sup>

## IV. Preparing Cross-Examination Questions

The second step to a successfully controlled cross-examination is to translate your topics into questions. The preparation of good questions is the single most important step in controlling the cross-examination. Good questions are leading, simple, brief, nonargumentative, and use the witness's own words whenever possible.

### A. Write Out Your Questions

Contrary to the usual advice about minimizing notes and appearing spontaneous,<sup>64</sup> you probably will have to write out your questions word for word if you seriously expect to maintain control during cross-examination. If you use no notes, or only sketchy and inadequate ones, then your cross-examination may become disorganized or you may omit a topic. Even worse, an imprecisely phrased question disrupts your entire examination if your opponent objects or if the question is broad enough to provide the witness with an opportunity to repeat damaging testimony. Ask yourself whether you are certain you can remember the exact foundation questions necessary to impeach with a criminal conviction, or exactly how many feet away a witness was standing from an accident scene. If not, then you would be well advised to write out your questions.

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62. See 3 FRANCIS X. BUSCH, *LAW AND TACTICS IN JURY TRIALS* § 373 (1960).

63. See 2 LOUIS E. SCHWARTZ, *PROOF, PERSUASION, AND CROSS-EXAMINATION: A WINNING APPROACH IN THE COURTROOM* 1612 (1976).

64. E.g., 2 MELVIN M. BELLI, *MODERN TRIALS* 1560 (1954). But cf. Irving Goldstein, *The Cardinal Principles of Cross-Examination*, 1959 TRIAL LAW GUIDE 331, 354-55 (recommending a topic outline, with all vital questions written out in full).

## **B. Index the Depositions and Prior Statements**

The main reason for carefully preparing specific safe questions based on the witness's own prior statements is for control. If the witness deviates from her prior version of the events, at least as to material issues, you have the ability to impeach that inconsistent statement. However, this ability is lost if you cannot *find* the specific prior statement. Looking through a hundred pages of a deposition to find the place where the witness said there were two people present, not three, can be an impossible task. For that reason, most experienced trial lawyers develop some kind of indexing method. The simplest way is to note beside each question you prepare exactly where the question came from—something you can only do if you have written out the questions.

For example, if you have prepared a high safety question that comes directly from lines eleven through thirteen on page forty-six of the witness's deposition, you might make some notation like "D46/11-13" in the margin beside your question. Then, if you need to impeach, you can pick up the deposition and go right to the appropriate sentence without breaking your rhythm. If you have prepared a medium safety question that cannot be refuted, you could put an "X" in the margin. That tells you just to move on if the witness gives a bad answer—not to press the point because you have no way to refute it.<sup>65</sup>

## **C. Control Through Proper Phrasing of Cross-Examination Questions**

### **1. Break Your Topics Down Into the Smallest Possible Units**

The most important concept of successful cross-examination is that *a topic and a question are different things*. You must divide a topic up into its smallest practical "fact units," and ask about each one separately. For example, suppose you represent the defendant in a personal injury action. Your expert will testify that most of plaintiff's

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65. If the depositions are numerous, law firms commonly enter the depositions into a laptop computer, so an associate can conduct word searches for prior inconsistent statements that arise unexpectedly.

medical problems were the result of pre-existing injury. To corroborate your expert, you intend to elicit from the plaintiff on cross-examination the fact that she had the preexisting injury. You could just ask:

Q: Ms. Roslyn, isn't it true that your back had previously been injured in an automobile accident in 1988?

Unless your adversary is extraordinarily inexperienced, the witness will be well prepared to respond on this topic. If you break this topic down into small fact units that can be strung together in a fast-paced cross-examination, you may never give the witness a chance to give her prepared speech:

Q: Ms. Roslyn, after the February 15th accident, you experienced back pain?

A: Yes.

Q: Stiffness?

A: Yes.

Q: Difficulty sleeping?

A: Yes.

Q: Difficulty walking?

A: Yes.

Q: You were also in an accident in March, 1988, is that right?

A: Yes.

Q: That's two years before the collision with David Simpson, right?

A: Yes.

Q: In 1988, you were hit by a city bus, weren't you?

A: Yes.

Q: And you went to the hospital?

A: Yes.

Q: In fact, you spent two weeks in the hospital, isn't that right?

A: Yes.

Q: Following that first accident, you experienced back pain, didn't you?

A: Yes.

Q: Stiffness?

A: Yes.

Q: Difficulty sleeping?

A: Yes.

Q: Difficulty walking?

A: Yes.

Q: And you were treated by Dr. Sidney Greenstreet?

A: Yes.

Q: Is he a back specialist?

A: Yes.

Q: Isn't it true that he told you in early 1989 that these symptoms might never go away?

A: Yes.

## 2. Ask Only One Fact Per Question

Questions should be narrowly tailored, each one containing a single fact. For example, if you ask "At 11:00 p.m., you went downstairs to the kitchen to get a drink of water, but you forgot your glasses, is that right?" the witness could answer the entire question "no" if the witness went to get an apple, despite the fact that the witness in fact forgot her glasses when she went down to the kitchen at 11:00 o'clock. You will be especially prone to asking compound questions in situations in which most of the facts are uncontested or unimportant. However, good cross-examination breaks this topic down into single fact questions:

Q: Were you home at 11:00 p.m.?

Q: You went downstairs, didn't you?

Q: You went to the kitchen?

Q: You got a drink of water, right?

Q: You were not wearing your glasses, were you?

## 3. Always Ask Leading Questions

Each question should suggest the desired answer. That is the only way you can be reasonably certain the witness will provide the evidence you need (remember that you usually cannot prepare adverse witnesses). A second advantage of leading questions is that you can choose the most persuasive words available. Word choice can affect how the jurors conceive the events. In one famous experiment, subjects were shown a film of a car accident.<sup>66</sup> One group was asked how fast the cars were going when they "hit." The subjects gave estimates averaging thirty miles per hour.<sup>67</sup> When another group of people was asked how fast the cars were going when they "smashed" into each other, their answers averaged over forty miles per hour.<sup>68</sup>

The best form of a leading question states a fact and asks the witness to agree with it:

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66. Elizabeth Loftus & John C. Palmer, *Reconstruction of Automobile Destruction: An Example of the Interaction Between Language and Memory*, 13 J. VERBAL LEARNING & VERBAL BEHAVIOR 585 (1974).

67. *Id.* at 586.

68. *Id.*

Q: You went downstairs, is that correct?

Using a positive question such as “is that correct?” or “Is that right?” is preferable to the negative “Is that not correct?” Compare the following two examples:

Q: You did not lock the door, is that not correct?

Q: Is it true that you did not lock the door?

However, a whole series of questions ending in “is that right?” will drive the jury crazy.

Q: You went downstairs, is that right?

Q: You went to the kitchen, is that right?

Q: You opened the knife drawer, is that right?

Q: You took out a butcher knife, is that right?

Q: You cut an apple with it, is that right?

If you break your questions down into small units and ask them one after another, you can omit the suggestion part of the question while remaining in control. Your voice inflection can make the statement of fact sound like a question. For example:

Q: You went downstairs, is that right?

Q: You went to the kitchen?

Q: You opened the knife drawer?

Q: You took out a butcher knife?

Q: You cut an apple with it?

Is there ever a justification for asking a non-leading question during cross-examination? The answer depends on whom you turn to for advice. Some writers take the position that you never should ask anything but a leading question, whether you are impeaching or eliciting helpful testimony.<sup>69</sup> Others suggest that open questions sometimes may be appropriate in order to break up the monotony of leading questions,<sup>70</sup> to avoid the appearance of putting words in the witness’s mouth,<sup>71</sup>

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69. See, e.g., YOUNGER, *supra* note 27, at 22-23.

70. See, e.g., Bergman, *supra* note 28, at 553 n.12; Jeffrey H. Hartje, *Cross-Examination—A Primer for Trial Advocates*, 8 AM. J. TRIAL ADVOC. 11, 51 (1984).

71. See Bergman, *supra* note 28, at 553 n.12.

or to enable you to go on a fishing expedition necessitated by a desperate situation.<sup>72</sup>

#### **4. Keep Your Questions Simple**

Your question must be understandable to both the witness and jurors. Keep the language simple and universal, especially when cross-examining a witness who speaks in jargon. Compare the following:

Q: Did you then proceed to exit your patrol vehicle?

Q: Did you get out of your car?

#### **D. Use the Witness's Own Words Whenever Possible**

A corollary of the principle that a topic is of highest safety if you can impeach a bad answer with a prior statement is that you should keep to the exact words used in that prior statement whenever possible. Save inferences, explanations and exaggerations for closing argument. For example, suppose a witness said in a deposition that he had consumed five beers before the accident. Suppose you ask:

Q: You were drunk the night of the accident, weren't you?

A: No.

What has happened to your high safety question? Nowhere in the witness's statement did he say he was intoxicated. You may eventually be able to convince a judge that "five beers" is inconsistent with "not drunk," but you have lost control of the examination. Suppose you had asked:

Q: You had five beers the night of the accident, is that right?

The witness would have to admit this or suffer specific impeachment.

#### **E. Ask About Facts, Not Conclusions**

The time for drawing conclusions is in the closing argument, not cross-examination. Asking conclusory questions will sometimes draw

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72. *Id.* at 573-74.

an objection as argumentative and is always a bad idea. The witness does not have to agree with your conclusions, but the jury must.

One common type of conclusory question asks the witness to agree to your characterization of the facts. The problem is that the witness probably does *not* agree with you, and will gladly tell the jury so.

Q: It was 2:00 a.m.?

Q: It was raining?

Q: There are no streetlights, are there?

Q: *So it was very dark that night, wasn't it?*

The witness will probably say, "No, I could see all right."

The other common type of conclusory question is one that summarizes testimony. Because a summary must be in question form, it again opens the door to a witness explanation.

Q: It was 2:00 a.m.?

Q: It was raining?

Q: There are no streetlights, are there?

Q: You were in your car?

Q: You were a block away from the scene?

Q: *So it's your testimony that on a dark rainy night you could clearly identify the defendant from a block away when there were no streetlights?*

The witness will probably say, "Yes, there was enough light."

## F. Do Not Ask the Witness to Explain an Answer

As soon as you ask a witness "Why?," you have given the witness free rein to say anything she wishes. The classic illustration of this problem is the story of a case in which the defendant was charged with battery for biting off the complaining witness's ear. On cross-examination, the eyewitness admitted that he did not actually see the defendant bite off the victim's ear, but was nevertheless certain the accused had done so.<sup>73</sup> The defense attorney asked the fatal question:

Q: If you didn't see the defendant bite the victim's ear, how can you say you are certain he did so?

A: Because I saw him spit it out.<sup>74</sup>

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73. I first heard the story from the late Irving Younger. It also appears in 3 FRED LANE, GOLDSTEIN TRIAL TECHNIQUE § 19.30 (3d ed. 1984).

74. *Id.*



## V. Conducting the Cross-Examination

Selecting appropriate safe topics and preparing good questions is the first step in controlling cross-examination. Next you must deliver those questions effectively so as to maintain control and limit the answers of the witness. What techniques will facilitate this?

### A. The Single Most Important Technique for Conducting Cross-Examination

Talk fast.

### B. Should You Try to Limit the Witness's Answers?

If you ask the short, simple, one-fact, leading questions you have written out, keeping a fast pace, then the problem of runaway witnesses should rarely arise. When it does, how do you handle a witness who is evasive, keeps volunteering information, or insists on explaining or justifying "yes or no" answers? You can harm yourself in many ways if you try to stop these explanations; the witness can harm your case if you do not. Should you try to limit a witness's answers? Lawyers probably disagree more on this point than on any other.

Some lawyers favor trying to limit a witness's answers and prevent the witness from volunteering testimony. They argue that you must do *something* to try to control a hostile, loquacious witness, or risk losing complete control of your cross-examination. Three tactical approaches are available:

#### 1. The Preventive Approach

Some lawyers recommend that you begin your cross-examination with a question such as, "I am going to ask you some specific questions, so please answer them with a simple 'Yes' or 'No' if possible; can you do that?"<sup>75</sup>

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75. But see Hartje, *supra* note 70, at 51-52 (stating that this may draw an objection because witnesses are usually permitted to explain answers).

## 2. The Formal-Objection Approach

Other lawyers recommend that you do not try to deal with a difficult witness yourself, but that you enlist the help of the judge by objecting to anything beyond a “yes” or “no” answer, such as “If the Court please, I object to the volunteered portion of the witness’s answer and ask that the portion of it following the answer ‘yes’ be stricken.”<sup>76</sup>

## 3. The Self-Help Approach

Some lawyers suggest that you appear weak and inexperienced if you have to go crying to the judge for help. They recommend that you handle the matter yourself. You may simply cut off volunteered testimony by stating, “Thank you, you have answered the question,” or “Your lawyer can ask for explanations on redirect.” Alternatively, you can be more sarcastic, saying something like, “Perhaps you did not hear my question. All I asked you was [repeat the question]. Do you think you can try to answer it?”

Some experienced trial lawyers argue that the better approach is to tolerate the explanations and evasions, for several reasons: First, many judges feel that witnesses should be allowed to give explanations. You do not want the judge to rebuke you. Second, you run the risk of giving the jurors the impression you are trying to keep something from them. There is some psychological data that an attorney who appears too one-sided is less persuasive than one who appears to consider both sides.<sup>77</sup> Third, your opponent is likely to elicit the explanation on redirect examination anyway. Finally, you may not realize that you have phrased the question in a way that it is not answerable by “Yes” or “No,” in which case you may look foolish.

My own advice is that you do nothing, at least at first. This advice may seem to contradict the basic premise that cross-examination must be tightly controlled, but it does not. If you have carefully chosen and organized your topics, broken your topics down into safe questions that

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76. 3 FRED LANE, GOLDSTEIN TRIAL TECHNIQUE § 19.78 (3d ed. 1984).

77. See JEFFREY T. FREDERICK, THE PSYCHOLOGY OF THE AMERICAN JURY § 6-102, at 188 (1987).

are written out, and indexed the deposition for impeachment purposes, then you have minimized the likelihood that this issue will arise at all. The concepts of control and safe questions assume merely that you have the ability to impeach a witness who testifies differently; these concepts have nothing to do with a witness who amplifies, explains, or rambles. If a witness actually changes her answer, you can impeach; if she merely tries to explain away the damaging parts, you probably should do nothing. The witness's own obvious attempts at evasion will be a more effective impeachment.<sup>78</sup>

Eventually, however, the witness's continual evasiveness and hostility may deserve response. In such situations, trying to control the witness yourself, rather than asking the judge to do it, is best. The self-help techniques suggested above should be tried first. Only if a witness is completely out of control should you seek the judge's assistance.

### C. Know When to Abandon a Line of Questions

There are two reasons for deciding to stop pursuing a line of questions, one good and one bad. Occasionally, the witness will give you an unexpectedly *favorable* answer partway through a planned line of questions. If you continue to press, the witness may retreat from that position and the point is lost. For example, suppose a defense attorney had prepared the following cross-examination of an eyewitness to a car-pedestrian accident, pointing out the witness's poor opportunity to observe:

- Q: You did not see the defendant's car before the collision, did you?
- Q: You were talking to a friend, correct?
- Q: You were looking at your friend, is that right?
- Q: Then you heard brakes squeal?
- Q: You did not look toward the car until after the sound of the brakes, right?
- Q: So you did not see whatever it was that caused the driver to slam on the brakes, did you?

Suppose the actual cross-examination by defense counsel went like this:

- Q: Did you see the defendant's car before the collision?
- A: No.

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78. If you have any doubts, watch the cross-examination of Captain Queeg in the movie version of *The Caine Mutiny*.

Q: You were talking to a friend, correct?

A: Yes.

Q: You were looking at your friend, is that right?

A: Yes—well, except for when my friend pointed out the plaintiff who was walking down the middle of the street with a bottle of vodka in his hand.

You probably should not continue the line of questions!

The second reason to stop cross-examining is because you were pursuing a medium safety topic, and the witness started giving bad answers. Continuing the example above, suppose the cross-examination went like this:

Q: Did you see the defendant's car before the collision?

A: Yes.

Q: But weren't you talking to a friend just before the accident?

A: No, that was several minutes before the accident.

Now is probably the time to abandon this line of questions.

### **D. Know How to Impeach With a Prior Inconsistent Statement<sup>79</sup>**

The reason experienced lawyers recommend high safety questions is because you can impeach a witness who changes testimony. This obviously helps you control the cross-examination. However, this whole process of preparing safe questions containing single facts, using the witness's own words, and limiting yourself to leading questions, will control the cross-examination only if you know how to effectively carry out the impeachment. To do this, you must understand six things:

#### **1. Impeachment is not the same as refreshing recollection.**

If, in answer to a safe question taken directly from a prior statement, a witness testifies that she does not remember, then you may choose to refresh recollection. However, if a witness gives an answer unexpectedly different from one contained in a prior statement, it does not mean

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79. See generally Steven Lubet, *Understand Impeachment*, 15 AM. J. TRIAL ADVOC. 483 (1992); Louis M. Natali, Jr., *Cross-Examination*, 7 AM. J. TRIAL ADVOC. 19, 26-41 (1983) (giving several examples).

the witness has forgotten the facts. You cannot refresh memory when the witness claims to be able to remember (nor has a proper foundation been laid to allow it);<sup>80</sup> you must impeach and show the current memory to be unreliable.

**2. Do not try to convince the witness to change her testimony; prove unreliability.**

You are supposed to be impeaching, not trying to talk the witness into changing her testimony. You must accept the fact that the witness's memory has changed. No matter how sure you are that it was just an inadvertent misstatement, you will not convince the witness to testify differently, no matter how many times you ask the witness to re-read a prior statement. The only thing that will happen if you try is that the witness will repeat and emphasize the unfavorable testimony, you will have completely lost control of the examination, and you will have wasted the opportunity to impeach. If the witness actually made only an inadvertent misstatement, then the witness probably will make the correction anyway when confronted with the prior inconsistency. So you lose nothing by assuming the worst and impeaching accordingly.

**3. Inconsistent testimony does not mean the witness is evil.**

When a witness testifies to facts different from those contained in a prior statement, the testimony may be an inadvertent misstatement, a result of the natural process of erosion of memory. It might be an intentional change due to deliberate perjury, but is not necessarily so.

**4. Impeach direct examination testimony, not cross-examination.**

The general rule governing impeachment by prior inconsistent statements is that you may impeach facts testified to on direct examination

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80. See, e.g., *United States v. Shoupe*, 548 F.2d 636, 641 (6th Cir. 1977); *United States v. Morlang*, 531 F.2d 183, 191 (4th Cir. 1975); *Goings v. United States*, 377 F.2d 753, 760 (8th Cir. 1967), *cert. denied*, 393 U.S. 883 (1968).

only.<sup>81</sup> If you bring up an issue for the first time on cross-examination and get bad answers, your only recourse is to abandon the line of testimony.

### **5. Impeach specific factual assertions, not inferences.**

You can impeach a witness who disagrees with a specific fact or opinion written down in a previous statement. However, if the witness disagrees with your *interpretation* of those facts, then she cannot be impeached. For example, suppose a witness stated in a deposition that the defendant's car was traveling sixty miles an hour. If she testifies the car was going thirty miles per hour, you can impeach. If you ask for an interpretation, such as "Was the car going very fast?" and the witness says "No," you cannot impeach her by proving that she once said the car was going sixty miles per hour.

### **6. Impeachment always entails risk.**

Witnesses will often be able to explain away an apparent inconsistency, and you will often be unable to successfully complete the impeachment. Therefore, conduct this kind of impeachment at the same time as other risky cross-examination—in the middle.

The technique for impeachment is to break it down into three steps: (1) lock the witness into a definite answer, (2) prove that a prior statement on the subject was made, and (3) reveal to the jury that the prior statement on this specific subject was materially different.

The first requirement is that the witness must have given actual testimony on the subject. Assume you represent the defendant in a personal injury case who is accused of running a red light and striking a pedestrian. The plaintiff calls a witness who said in a prior statement that the light was still green when your client drove through. On direct examination, suppose the witness cannot remember the color of the traffic signal. Can you impeach? No; the witness has not given any testimony on the matter.

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81. See, e.g., *White Consol. Indus. v. American Liberty Ins. Co.*, 617 So. 2d 657, 660-61 (Ala. 1993); *State v. Bulen*, 646 S.W.2d 405, 408 (Mo. Ct. App. 1983).

### **a. Step One: Lock the witness into a definite answer**

Suppose the witness testifies on direct examination that the light was red—an obvious inconsistency. Your first step in the impeachment process is to lock the witness into a definite answer to a specific question. Try to do this without unnecessarily repeating the unfavorable testimony. Specifically asking the witness if she is certain of her testimony is probably a bad idea. For example:

Q: You said the light was red?

A: That's right.

Q: Are you sure?

A: Oh yes, I looked at it very carefully.

Q: Could you be mistaken?

A: No.

Instead, remember you are laying a foundation for impeachment in which you will suggest that the witness has recently changed her testimony. Emphasize the *old* version (the one that was changed), not the trial version. For example:

Q: The light was green, wasn't it?

A: No, it was red.

Q: Not green?

A: No.

Sometimes a witness who is aware of the inconsistency will refuse to be pinned down. For example:

Q: The light was green, wasn't it?

A: No, I think it was red.

Q: Are you saying definitely it was not green?

A: No, I'm not saying that, only that it might have been red. I wasn't paying close attention.

If the witness testifies to an inability to recall accurately, *you have accomplished your purpose* of proving that the witness's memory is unreliable and continuing is pointless. Recall that *you are not trying to get the witness to change her testimony*. If you press the matter, the witness will probably only explain away the prior statement by repeating that she is uncertain.

## **b. Step Two: Prove that a prior statement on the subject was made**

Once you have the witness locked into a specific answer, you must prove that the witness made a prior statement covering this issue. You can do this by asking the witness about the statement, being specific about the time, place, and circumstances. For example:

Q: Do you remember talking to an investigator named Sarah Frandsen at your house?

A: Yes.

Q: That was on September 16?

A: Yes.

Q: She asked you about the facts of this case, right?

A: Right.

Q: Do you remember answering questions about the scene of the accident?

A: Yes.

In most jurisdictions, the courts require you to inform the witness of the time, place, and circumstances of the prior statement before you can refer to it.<sup>82</sup> Even if not strictly required, it is a good tactic to do so. It shows the witness and jury that you have a specific prior statement to which you are referring, and are not just fishing.

At this point in the process, some trial attorneys ask additional questions to build up the reliability of the prior statement. Although most prior statements are hearsay,<sup>83</sup> and you cannot argue that the jurors should believe a prior statement for its truth, you may demonstrate that the prior statement is just as trustworthy as the trial testimony. This strengthens your impeachment, because it eliminates any logical explanation for the inconsistency other than bad memory or dishonesty. For example:

Q: Two days later, Ms. Frandsen returned to your house, is that right?

A: Yes.

Q: She showed you a typed summary of your earlier conversation, is that right?

A: Yes.

Q: She asked you to read it over and sign it if it was accurate, correct?

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82. See, e.g., *Beavers v. State*, 492 P.2d 88, 91 (Alaska 1971); *Montoya v. People*, 740 P.2d 992, 995 (Colo. 1987); *State v. Heard*, 408 So. 2d 1247, 1250 (La. 1982).

83. FED. R. EVID. 801(d)(1)(A).



Q: Handing you defense Exhibit G for identification, is that your signature at the bottom?

A: Yes.

Q: You read the statement over before signing it, correct?

A: Yes.

Two other questions commonly are asked, but their legitimacy is dubious:

Q: Wasn't your memory better one week after the accident than it is today, two years later?

Q: Were you telling the truth when you made this statement or were you lying? (or worse) Were you telling the truth then or now?

The first statement is irrelevant because the prior statement is being admitted to impeach, not for its truth. You can only argue that the earlier statement was the correct one if it meets a hearsay exception. Both types of questions are argumentative and tactically unnecessary.

**c. Step Three: Reveal to the jury that the prior statement on this specific subject was materially different**

The final phase of this impeachment is to prove the contents of the prior statement and expose the inconsistency. Remember that you are proving this to the *jury*, not the witness. You must reveal the contents of the prior statement to the jury; whether you reveal the contents to the witness is irrelevant. The easiest way to make this revelation is to read aloud the precise inconsistent passage and ask the witness to confirm that she made it. For example:

Q: Directing your attention to the second line in the second paragraph of that statement, did you say: "When the car drove through the intersection, it had a green light?"

If you are impeaching based on a deposition, the process is slightly more cumbersome:

Q: Directing your attention to page twenty-six, lines four through seven, is it true that you were asked these questions and gave these answers: Question: "What color was the light?"; answer: "Green"; question: "Are you certain?"; answer: "Yes"?

As a courtesy, you might lean over and show the witness the page and line you are referring to, but *do not hand the document over to the witness and ask the witness to peruse it*. You are not refreshing memory or trying to convince the witness to change her testimony.

If the witness admits the inconsistency, then the impeachment is complete, and courts usually will not permit you to introduce the statement into evidence unless you can lay the foundation for a hearsay exception. However, if the witness denies or does not remember making the statement, you may introduce it and read the inconsistent portion to the jury. Under Federal Rule of Evidence 613, the statement is admissible without further foundation,<sup>84</sup> but in some jurisdictions, the statement must first be shown (not merely read) to the witness.<sup>85</sup>

### E. Choreography: Control Through Movement

In conducting a cross-examination, you should give some thought to where you will sit, stand and move during stages of the examination. Although some courts have local rules that restrict a lawyer's ability to move around the courtroom, most permit you to do pretty much what you want, except that *you may not approach too close to the witness*. Despite what you see on television, most judges will not permit you to lean on the edge of the witness box or get right up into the witness's face.

Walking and using fully the available space in the courtroom enables you to focus the jurors' attention on certain questions by moving to the blackboard, picking up an exhibit, or changing your position. During the first part of your cross-examination, when you are eliciting helpful information, you can stand at the side of the jury, where you would for direct examination. This way the witness looks in the direction of the jury. During the impeachment phase, you can move closer to the witness and away from the jury. This may increase the tension on the

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84. FED. R. EVID. 613(a).

85. See, e.g., *United States v. Marks*, 816 F.2d 1207, 1211 (7th Cir. 1987) (stating that judge may follow common law rule under particular circumstances to avoid confusing witnesses and jurors); *United States v. Thompson*, 708 F.2d 1294, 1299-1300 (8th Cir. 1983); *United States v. Nacrelli*, 468 F. Supp. 241, 253-54 (E.D. Pa. 1979), *aff'd*, 614 F.2d 771 (3d Cir. 1980).

witness and cause the witness to look away from the jurors. Either move may lessen the perceived credibility of that witness.<sup>86</sup>

## F. Handling Interruptions By Opposing Counsel

Some lawyers will unethically try to interrupt cross-examination and tip off their witnesses to "correct" answers. They may make a vague objection that your question is misleading:

I object. Counsel's question might mislead the witness. Counsel is obviously trying to insinuate that if the witness is talking to a friend, she cannot also be watching traffic. This witness was doing both at the same time.

If you permit this coaching, your control is threatened. You should object to it, possibly as follows:

I object to the interruption by opposing counsel. He appears to be telling the witness what to say.

## G. Handling Interruptions By the Judge

The trial judge has a right to interrupt a cross-examination to clarify testimony and bring out points overlooked by the attorney.<sup>87</sup> Nothing requires the judge to sit by and permit a miscarriage of justice. Therefore, the judge has discretion to interrupt and ask questions of the witness, but she generally does not have discretion to completely take over the cross-examination of a witness.<sup>88</sup>

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86. Psychologists have found that some witnesses appear less credible when tense. See generally Albert Mehrabian & Martin Williams, *Nonverbal Concomitants of Perceived and Intended Persuasiveness*, 13 J. PERSONALITY & SOC. PSYCHIATRY 37 (1969). Studies also indicate that witnesses appear less credible when they look away from the jury; Gordon D. Hemsley & Anthony N. Doob, *The Effect of Looking Behavior on Perceptions of a Communicator's Credibility*, 8 J. APPLIED SOC. PSYCHOLOGY 136 (1978).

87. See, e.g., *United States v. Williams*, 809 F.2d 1072, 1087-88 (5th Cir.), cert. denied, 484 U.S. 913 (1987); *Gayle v. Scully*, 779 F.2d 802, 806 (2d Cir. 1985), cert. denied, 479 U.S. 838 (1986); *Commonwealth v. Johnson*, 312 Pa. Super. 484, 492-93, 459 A.2d 5, 9-10 (1983).

88. See, e.g., *Sit-Set, A.G. v. Universal Jet Exchange, Inc.*, 747 F.2d 921 (4th Cir. 1984); *Chavanne by Chavanne v. Clover Financial Corp.*, 206 N.J. Super. 72, 78, 501 A.2d 1024, 1027 (Ct. App. 1985); *Wilson v. Anderson*, 420 Pa. Super. 169, 616 A.2d 34 (Super. Ct. 1992).

Objecting to the judge's intervention is difficult, especially if you must do so in the presence of the jury. Goldstein suggests you phrase your objection as follows:

If the Court please, and Counsel, I don't believe Your Honor intended to prejudice our case but I am afraid that the jury might take your questions to this witness in the wrong way. I feel that the record should show that we object and except to Your Honor's questions and the witness' answers.<sup>89</sup>

## VI. Conclusion

All cross-examination entails risk. You do not know what the witness will say. You do not know what your opponent has told the witness in private prep sessions. You do not know what the witness thinks of you. The witness is probably well prepared to testify to facts favorable to your opponent, and may not even remember the few facts you want. The witness may become talkative or freeze up. For all these reasons, you cannot expect to conduct an effective cross-examination unless you can control it in ways that minimize these risks.

If you are familiar with the law of cross-examination, take effective depositions, select your topics carefully, prepare and write out good questions, keep your crosses short, and then conduct cross-examination well, you will maximize your control. But bear in mind that cross-examination remains an uncertain, volatile phase of the trial no matter what you do. Every time you escape unscathed, you can thank the trial gods for smiling on you.

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89. 3 FRED LANE, GOLDSTEIN TRIAL TECHNIQUE § 19.89 (3d ed. 1984).

